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Report of the International Law Commission on the work of its fifty-third session (2001)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session prepared by the Secretariat

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Introduction

1. At its fifty-sixth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 19 September 2001, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its fifty-third session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 11th to 24th meetings, from 29 October to 9 November, and at its 27th meeting, on 19 November 2001. The Chairman of the International Law Commission at its fifty-third session introduced the report of the Commission: chapters I to IV at the 11th meeting, on 29 October; chapter V at the 16th meeting, on 2 November; chapter VI at the 19th meeting, on 5 November; and chapters VII to IX at the 22nd meeting, on 7 November. At its 27th meeting, on 19 November, the Sixth Committee adopted draft resolution A/C.6/56/L.17, entitled "Report of the International Law Commission on the work of its fifty-third session". The draft resolution was adopted by the General Assembly at its 85th plenary meeting, on 12 December 2001, as resolution 56/82.

3. By paragraph 19 of resolution 56/82, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the fifty-sixth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of five sections: A. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities); B. Reservations to Treaties; C. Diplomatic protection; D. Unilateral acts of States; and E. Other decisions and conclusions of the Commission.

Topical summary

A. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)

1. General comments

5. Several delegations welcomed the adoption by the Commission of the completed text of a draft preamble and 19 draft articles on the prevention of transboundary harm from hazardous activities, together with the accompanying commentaries. It was noted that the draft articles represented a useful attempt at filling in some of the gaps in the existing regime of international environmental treaties and contributed to the progressive development of international law. It was stated that the text of the draft articles had been tightened up and improved during the Commission's deliberations at its fifty-third session and provided a valuable framework of key provisions governing the obligations that should apply to States in whose territory or in areas of whose jurisdiction hazardous activities are undertaken. The draft articles focused on risk management and due diligence in preventing harm. As such, they highlighted States' obligations to consult one another about the potential risks of transboundary harm, but did not give any State the right to veto the hazardous activities of another State in its own territory.

6. It was noted that the text struck a balance between the freedom of States to engage in activities not prohibited by international law and the limitation on such freedom owing to environmental considerations and international cooperative arrangements. The draft articles gave due consideration to the positions of both the State of origin and the State likely to be affected.

7. The view was expressed that the Commission had made the right decision to deal first with the issue of prevention, which should be the preferred policy. It was noted, however, that the draft articles could still be improved and strengthened. A number of delegations were of the view that they were too limited in some respects. In particular, the view was expressed that the text should have made an explicit reference to the precautionary principle and that harm caused to areas

beyond national jurisdiction, such as the high seas or the seabed, should also have been covered by the text. In that context, a suggestion was made to consider setting up an international body which would be responsible for monitoring the environment in areas not under the jurisdiction of any State, and for conducting public activities at the international level.

8. The suggestion was also made that consideration should be given to whether the obligations concerning prevention should be exclusively procedural in nature, as was currently proposed, or should include substantive requirements to mitigate or prevent certain impacts.

9. It was noted that there was a need to pay due attention to issues relating to development and the transfer of technology and resources, with a view to capacity-building in developing countries. The initiatives for managing risk from hazardous activities which were indispensable for development should be placed in the overall context of the right to development, with due regard to the environment and the interests of States likely to be affected.

2. Comments on specific draft articles

10. Several delegations supported the approach adopted in the preamble. The view was expressed, however, that even though mention was made of the Rio Declaration on Environment and Development, the absence of an explicit reference to the precautionary principle was regrettable.

11. As regards **article 1**, support was expressed for the addition of the reference to "hazardous activities" in the title. There was also support for the use of the expression "significant transboundary harm", although it was noted that the "significant" threshold might be considered as a general condition for the applicability of the draft articles.

12. The view was expressed that the scope of the article should not be limited to those activities that are "not prohibited by international law" and that the draft articles should apply to all activities giving rise to significant transboundary harm, irrespective of whether that harm was caused by a lawful activity or a breach of an international obligation of the State concerned. It was noted, however, that the expression "not prohibited by international law" provided the basis for the distinction between the topic of international liability and the topic of State responsibility. It was also stated that the words "activities not prohibited by international law" were essential to indicate that further work remained to be done on the subject of liability following the adoption of the articles on prevention.

13. As regards the use of terms in **article 2**, it was noted that the definition of "transboundary harm" appropriately referred also to harm across maritime boundaries, including adjacent exclusive economic zones, and to situations where harm was caused in the territory of one State by activities in another, where those States did not have any common boundaries.

14. **Article 3** contained the core obligation on prevention. The opinion was expressed that although the provision provided a sound foundation for the draft articles as a whole, it remained unclear how the obligation of prevention related to the requirement for an equitable balancing of interests, as provided in articles 9 and 10. One view also suggested that in relation to the definition of preventive measures to be taken, the concept of "appropriate measures" should be more precisely defined.

15. It was noted that the reference to "competent international organization" in **article 4** should be interpreted as including relevant regional organizations. One view considered also that the formula used made it possible to extend the scope of the provision to non-governmental organizations capable of offering appropriate cooperation with a view to preventing and minimizing the risk of transboundary harm.

16. As regards draft **article 5** on implementation, the suggestion was made to improve the wording of the provision so as to bring out more clearly the obligation on States to take the necessary measures without undue delay.

17. As regards **article 6** on authorization, the suggestion was made to clarify the language of the provision to reflect more precisely that it was the State of origin that granted authorization to an entity which intended to undertake or was undertaking a potentially hazardous activity.

18. **Article 7** referred to environmental impact assessment. The view was expressed that the provision on environmental impact assessment should be stronger. The comment was also made that it was preferable to conclude binding agreements in the area

of environmental impact assessment on a regional or topical basis, rather than at the global level.

19. As regards **article 8** on notification and information, the concern was expressed that, with respect to the response to notification by the State of origin of the risk of significant transboundary harm, it was not clear whether the response of the State likely to be affected had to be definitive or whether provisional notification would serve as a response. Furthermore, it was questionable whether the State likely to be affected had to agree to the carrying out of the activity or whether, at its own discretion, it could suggest to the State of origin that consultations should be held under article 9.

20. Also with regard to **article 8**, the comment was made that it should be construed to mean that the timely notification which the State of origin was bound to give to a State likely to be affected had to be issued irrespective of political tensions. Should a direct notification of that sort prove to be politically impractical, the State of origin would be obligated to provide the notification to a third party or a competent international organization, which, for its part, would convey it to the affected State.

21. As regards **article 9** on consultations on preventive measures, the view was expressed that, in relation to paragraph 3, it would be advisable to define more precisely the extent to which the State of origin had to take account of the interests of the State likely to be affected, where no commonly agreed solution had been reached in consultations. In that case the sole guide should be an equitable balance of interests. The suggestion was also made to include a reference to the suspension of the planned activities for a period not exceeding six months.

22. On **article 10**, the view was expressed that there was a risk that parties might have different views on what constituted an "equitable balance of interests". This suggested the need for a strong dispute settlement clause. It was noted also that account should be taken of the level of development of States when considering the costs involved and the technical and financial resources required in dealing with the risks arising from the hazardous activities. Subparagraph (d) did not appear adequate in that respect since it referred to the costs which States were prepared to contribute, not those which they were able to contribute. The suggestion was also made to combine subparagraphs (a) and (b) and to set out with more clarity the precautionary principle implied in subparagraph (c).

23. One view considered that article 10 might have included a specific mention, at least in the commentary, of the risks to vulnerable elements of biodiversity, as well as an explicit reference to the global impact on agriculture of risks affecting centres of origin and genetic diversity. It was noted, however, that the list in article 10 was not exhaustive, allowing States to take additional factors into account.

24. As regards **article 11**, one view considered that paragraph 3, requiring the State of origin to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity for a reasonable time, should not be placed in article 11, which dealt only with procedures in the absence of notification, but rather should be inserted in article 9, which provided for consultations on preventive measures.

25. As regards **article 13**, the suggestion was made to strengthen the provision so as to ensure that the public was also able to present views and influence the process. It was also noted that the requirement to inform the public about the activities and the risks involved should be formulated in accordance with national laws.

26. As regards **article 14** on national security and industrial secrets, the suggestion was made to introduce an element of proportionality in connection with the provision of certain information where the particular circumstances surrounding a hazardous activity might warrant it.

27. On the issue of dispute settlement, several delegations welcomed the introduction in **article 19** of recourse to an impartial fact-finding commission within the framework of dispute settlement. The view was expressed that the fact-finding mission should also have conciliation powers since a dispute might not turn solely on the facts.

28. A number of delegations considered, however, that the dispute settlement provisions needed to be strengthened, in line with article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, in particular by providing for the option of submitting a dispute to arbitration or judicial settlement, as well as the possibility of the

compulsory settlement of disputes by the International Court of Justice.

29. One view considered that there was no need to spell out the means of dispute settlement since they were all covered by the reference to "peaceful means of settlement". Another view doubted whether paragraph 1 should list the peaceful means of settlement, which might be chosen by the parties to settle disputes concerning the interpretation or application of the articles, given that Article 33 of the Charter of the United Nations contained a more comprehensive list.

3. Future form of the draft articles

30. Several delegations supported the Commission's recommendation to the General Assembly to elaborate a framework convention on the basis of the draft articles on prevention. It was noted that that approach need not be inconsistent with the approach adopted for the topic of "nationality in relation to State succession", where the General Assembly had taken note of the draft articles with a view to their further elaboration in the form of a convention.

31. Other delegations considered that it was premature for the draft articles to be taken up at the diplomatic level before the Commission had completed its work on the issue of liability. It was suggested that the Commission should take up the issue of international liability as soon as possible, and that only once it had completed its work on the liability aspect might a convention addressing both prevention and liability be negotiated.

32. One view considered that there should be a period of study by States before the Sixth Committee examined the draft articles more closely. Another view considered that the draft articles still required some work and that a working group of the Sixth Committee should be established to continue work on the topic.

33. The view was also expressed that the draft articles might more usefully be adopted as a set of criteria to guide States in the conduct of their relations, in particular when negotiating relevant agreements at the bilateral and multilateral levels.

4. Future work on the issue of liability

34. Several delegations were of the view that the Commission should resume its work on the issue of liability. It was noted that a clear set of rules on liability was a *condition sine qua non* for the establishment of an appropriate regime for transboundary harm. It was also stated that there was sufficient material on the topic of international liability in State practice, jurisprudence and international agreements, which should be explored and studied. Mention was made of the work on international liability of the former Special Rapporteur, Julio Barboza, in his several comprehensive reports on the topic.

35. Other delegations considered that the Commission should take some time to first assess whether or not codification of the liability aspect was feasible. The suggestion was made that the Commission might usefully survey the various treaties dealing with liability questions and ongoing projects in other forums. Such a survey would provide it with the opportunity to consider what lessons might be drawn from the respective successes and failures of those instruments and to consider whether there was additional work which would be of genuine value which the Commission might undertake.

36. As regards the substance of the liability aspect, the view was expressed that the Commission should develop procedural standards on access to justice and substantive standards on liability and redress. This should include an obligation on States to establish civil liability regimes whereby the operator of a hazardous activity would be required to take remedial action and make reparation in accordance with the polluter pays principle. The liability regime should also provide for the residual liability of the States where there was no effective operator liability.

B. Reservations to treaties

1. General comments

37. Some delegations were of the view that the rules on reservations laid down in the Vienna Convention on the Law of Treaties had worked well, acquired the status of customary norms and struck a good balance between preserving the texts of the treaties and the goal of universal participation in treaties. Consequently, different regimes applicable to human rights treaties would impair universal participation in those treaties. Moreover, States and not monitoring bodies should ensure themselves that their reservations were consistent with the object and purpose of the treaty.

38. Other delegations expressed the view that the exclusion of reservations to a multilateral treaty, while appearing inflexible, could ensure the integrity of a complicated system of rules and values particularly in fields such as human rights where the equality among States and the international community's commitment to universality and indivisibility should not be eroded. A way should be found to reconcile national legal systems with obligations under international law without subjecting a treaty system as a whole to another system of norms and values considered superior in rank by the reserving State and thus depriving a multilateral convention of much of its value, which precisely consisted in defining common standards.

39. Some delegations wondered whether the draft guidelines on interpretative declarations were in conformity with article 31 of the Vienna Convention.

40. Moreover, many delegations doubted the utility of giving separate treatment to the concept of conditional interpretative declarations, which seemed rather vague. The effects of conditional interpretative declarations were very similar to those of a reservation, but this concept needed still to be clarified. If further work confirmed that the same rules applied to the effects of reservations and conditional interpretative declarations, it might not be necessary to include in the Guide to Practice guidelines relating to conditional interpretative declarations. The guidelines relating to reservations should apply to conditional interpretative mutatis mutandis declarations. Some problems might however remain, such as how to distinguish between reservations and interpretative declarations. Various delegations thought that it would be preferable for the Commission not to include in the Guide to Practice draft guidelines relating to conditional interpretative declarations.

41. According to another view, the guidelines relating to interpretative declarations and conditional interpretative declarations were necessary since the purpose of the Guide to Practice was to fill the gaps in the Vienna Conventions without modifying their provisions and to clarify State practice.

42. The view was expressed that simple interpretative declarations might constitute reservations "in disguise", but only when they were formulated in writing. Consequently, the Guide to Practice should deal only with simple interpretative declarations formulated in writing and normally submitted to the depositary.

43. The inclusion of international organizations in the draft guidelines was also welcomed, because it reflected the increasing role played by international organizations in law-making.

44. A number of other views of a general character were voiced. According to one view, it would be useful to include more information on the interrelation of human rights treaties bodies and the work of the Commission. According to another view, the draft guidelines might prove to be too detailed and complex to be useful. Yet a further view was expressed that the issue of reservations incompatible with the object and purpose of the treaty should have the highest priority in the future work of the Commission.

2. Draft guidelines

Draft guideline 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty)

45. It was pointed out that the draft guideline should be expanded to include cases in which a treaty merely *allowed* the parties to make a choice between two or more provisions of the treaty.

Draft guideline 2.1.1 (Written form)

46. It was stated that "oral reservations" could not exist since the written form was the only means of guaranteeing stability and security in contractual relations.

Draft guidelines 2.1.3 (Competence to formulate a reservation at the international level)/2.4.1 (Formulation of interpretative declarations)

47. It was pointed out that the word "competence" might give rise to confusion and it was necessary to draw a distinction between the authorities competent to "make" or "formulate" a reservation and those competent to "express" or "present" the reservation at the international level. Moreover, the number of persons who might be competent to formulate a reservation at the international level should not be extended.

Draft guidelines 2.1.3 bis (Competence to formulate a reservation at the internal level)/2.4.1 bis (Competence to formulate an interpretative declaration at the internal level)

48. Some delegations stated that these draft guidelines should not be included in the Guide since the competence to formulate reservations or interpretative declarations at the internal level should be dealt with under the domestic legislation of each State.

Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

49. One view expressed disapproval with this draft guideline, which aimed erroneously and without any reason at the maintenance of the validity of reservations, which by definition affected the overall integrity of a treaty. In such a case, domestic law should be decisive and no assistance should be given to a State in formulating a reservation in violation of an internal rule.

Draft guidelines 2.1.5 (Communication of reservations)/2.4.9 (Communication of conditional interpretative declarations)

50. It was stated that the meaning of the phrase "a deliberative organ that has the capacity to accept a reservation" needed to be clarified.

Draft guideline 2.2.2 (Instances of non-requirement of confirmation of reservations formulated when signing a treaty)

51. The suggestion was made to add the words "in accordance with the relevant provisions of the treaty" after the words "by its signature".

Draft guideline 2.2.3 (Reservations formulated upon signature when a treaty expressly so provides)

52. It was stated that the draft guideline aimed at constituting an exception to the general rule contained in draft guideline 2.2.1. Moreover, the solidity of State practice regarding the confirmation of reservations and the interpretation of such confirmation was questioned.

Draft guidelines 2.4.3 (Time at which an interpretative declaration may be formulated)/2.4.4 (Non-requirement of confirmation of interpretative declarations made when signing a treaty)

53. It was suggested that the phrase "unless the treaty provides otherwise and" could be inserted at the beginning of draft guideline 2.4.3, before the words "without prejudice". Moreover, that guideline could be merged with draft guideline 2.4.4.

3. Late formulation of reservations

54. A number of delegations expressed the view that tolerance of the relatively new practice of late reservations should not lead to its abuse; late formulation of reservation should be made only in the light of changed circumstances or needs or to remedy an oversight. The requirement of unanimous consent from the other parties would also deter frequent and abusive use of this practice. Other delegations were concerned that draft guidelines 2.3.1 and 2.3.2 on the late formulation of reservations would have the effect of making the whole regime of reservations, applicable to so-called "late" reservations which did not fall under the definition of reservations as reflected in article 19 of the Vienna Convention on the Law of Treaties and the definition of the International Law Commission itself. A late reservation constituted in reality a different kind of declaration. States parties to a treaty could always agree to apply the regime of reservations to "late" reservations in respect of a treaty, but that did not change the fundamentally different nature of such declarations. The approach suggested in the draft guidelines could introduce an element of instability into treaty practice and eventually result in encouraging late reservations without any discernible benefit, compromising the basic principle of *pacta sunt servanda*. The application of a regime of "late reservations" would result in a risk of abuse or in the creation of a system of amendments to treaties which would be contrary to the rules set out in articles 39 to 41 of the Vienna Convention. The Commission's suggestion that reservations formulated late should be admitted if the treaty did not provide otherwise and there were no objections to their late formulation might reduce the risk of abuse.

55. According to another view, the Commission had performed a useful task by developing a guideline on the late formulation of reservations which clarified the

conditions for that practice and the procedure to be followed. That procedure envisaged the formation of a new tacit agreement among all the contracting parties to accept the "late" reservation (amounting to a "revision" of the treaty) without compromising the integrity of the principle *pacta sunt servanda*. However, since the late formulation of reservations was a complicating factor in treaty relations, the practice should remain limited to cases in which the late formulation represented a reasonable alternative to the practice of denunciation of the treaty, followed by a new ratification accompanied by the reservation. Moreover, the absence of an objection to such or other late reservations in the designated period should not be interpreted as a tacit consent.

56. According to yet another view, a modification to a reservation that did not constitute withdrawal or partial withdrawal should also be considered as a new reservation requiring the acceptance of the contracting parties.

57. Concerning the use of the term "objection" with regard to opposition to the procedure of late formulation of a reservation, several delegations expressed the view that although they could accept the term they felt that the use of an alternative term such as "rejection" or "refusal" or even "objection to the right to formulate a late reservation", "denial of that right" or "opposition to that right" might avoid confusion. The term "objection" was also considered appropriate since it related not only to the substance of the reservations but also to the date on which they had been formulated.

58. The period of 12 months following the date on which notification of the reservation had been received was a reasonable time limit for the tacit acceptance of the late formulation of reservations, and to require express unanimous consent would rob of any substance the rule that late reservations could be made under certain conditions. The legal effects of the acceptance of the late formulation of a reservation should be clear, since it could be presumed from draft guideline 2.3.3 that acceptance of the late formulation of a reservation signified acceptance of the reservation itself. However, the question deserved to be further studied in depth.

59. The view was also expressed that the issue of the late formulation of reservations should continue to be studied by the Commission in order to enable it to determine whether there were enough examples to justify the formulation of general rules, whether such State practice fell within a regime of specific treaties and, if so, whether the rules pertaining to them should be established in the Guide to Practice. It was furthermore stated that existing practice showed that late reservations were usually permitted in the context of treaties which specifically authorized reservations; moreover, the practice was hardly compatible with human rights treaties.

4. Role of the depositary

60. The proposals of the Special Rapporteur with regard to the functions of depositaries were welcomed. It was noted, however, that the draft guidelines should not depart from the provisions of the Vienna Convention on the Law of Treaties, especially article 77 thereof.

61. The view was expressed that, since the institution of the depositary had been changed by the widespread adoption of the 1969 Vienna Convention on the Law of Treaties, the depositary should call the attention of the reserving State to any inadmissible reservation contained in the instrument of ratification, acceptance, approval, etc. If the State concerned wished nevertheless to proceed, a difference within the meaning of article 77 of the Vienna Convention could arise between the State and the depositary as to the performance of the latter's functions. In such a case and in accordance with that article, the depositary would bring such a question to the attention of the signatory States and contracting States or of the competent organ of the international organization concerned. The depositary himself did not have the right to review the legitimacy of reservations or refuse to transmit reservations which he deemed illegitimate.

62. Many delegations were of the view that the depositary performed essentially an information function, consisting in communicating to the other parties any reservation submitted by a State, and it was for the parties to determine whether such reservation was admissible or not.

63. It was pointed out that the role of the depositary was important but difficult and that the draft guidelines should encourage depositaries to adopt a uniform practice. The crux of the matter was the acceptance of reservations and objections to them.

64. However, in a situation where there was a prima facie prohibition of reservations or of certain types of

reservations, the depositary might be able to reject such evidently prohibited reservations by informing the State concerned of the reason for rejection, acting thus as an "umpire". On the contrary, when reservations were not expressly prohibited under the treaty but seemed to be incompatible with the object and purpose of the treaty under article 19 (c) of the Vienna Convention, the judgement should be left to the contracting parties and the depositary could only be a "facilitator".

65. According to another view, the provisions of articles 77 and 78 of the 1969 Vienna Convention could be reproduced and adapted to the particular case of reservations in the Guide to Practice. Thus, to confer on the depositary the power to refuse to communicate a manifestly inadmissible reservation would appear to be a logical consequence of the application of article 19 of the 1969 Vienna Convention. It would be useful for the formal validity of the reservation to be examined, preferably before communication.

66. The whole question should be further studied, since current practice appeared to show that depositaries were rejecting reservations prohibited by the treaty itself. It was also stated that if the reserving State nevertheless insisted on the reservation being circulated, the depositary could not refuse to communicate it.

67. The Commission should also consider the question of the role to be played by any body established under the treaty, with the purpose of following up the obligations of States in such areas as human rights.

C. Diplomatic protection

1. General comments

68. Support was expressed for the Commission's work on diplomatic protection, and for the progress made on the issues of continuous nationality, transferability of claims and the exhaustion of local remedies. The Special Rapporteur was commended for his progressive approach to what was a classical chapter of international law. Agreement was expressed with the Commission views that the topic was of great practical significance; it had not become obsolete, despite the institution of dispute settlement mechanisms, and was ripe for codification. Indeed, it was suggested that the Commission should give priority to the topic at its next session. It was important to focus on practicalities, with a view to producing a guide for practitioners. Rules of diplomatic protection were closely related to the basic principles and structure of inter-State relationships, helping to divide competences among States and to ensure respect for international law, without prejudice to other relevant rules such as those governing human rights or investment protection.

69. The hope was expressed that the Commission's work on the topic would be confined to broad principles, so that they could be completed within the next five years, leading to the adoption of a codification instrument which was based on international practice and judicial decisions. Others maintained that the draft articles should reflect the progressive development of the law, while not departing too far from customary international law.

2. Comments on specific articles

Article 2

70. A view was expressed in connection with article 2, considered by the Commission in 2000,[1] that the threat or use of force should not be regarded as a lawful means of diplomatic protection, and the same was true of reprisals, retortion, severance of diplomatic relations and economic sanctions. According to this view, "humanitarian" intervention was sometimes no more than a pretext for an abuse of the use of force. Diplomatic protection should be the initiation of a procedure for the peaceful settlement of a dispute, and the use of force was only justified in legitimate self-defence. Any other interpretation would cast doubt on the basic principles of international law as set forth in the Charter of the United Nations.

Article 6

71. As regards article 6 of the draft articles considered by the Commission in 2000,[2] support was expressed for the view that the State with the dominant and effective link was the one entitled to act on behalf of its national. Such a State should have that right even where the protection was aimed against the State of the other nationality. Although there were some doubts as

[1] See *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), paras. 430-439.

[2] Ibid., paras. 472-480.

to the pertinence of the practice cited by the Special Rapporteur, it was observed that the article represented a desirable solution and, if existing practice proved insufficient, the article could be regarded as an example of the progressive development of the law. Others stated that it would be helpful if the Commission could define the concept of an effective link more precisely to avoid ambiguity. At the same time, a view was expressed that it would not be appropriate for the Commission to attempt to define the nationality link for legal or natural persons or the conditions for granting nationality. It should rather focus on defining the conditions under which nationality could be invoked before another State in the context of diplomatic protection. It was recalled that the International Court of Justice had broached the question in the *Nottebohm* case, but only in very general terms, and its jurisprudence had not been unanimously accepted.

Article 8

72. In response to a question relating to article 8 contained in the Commission's 2000 report,[3] some delegations reiterated their view that a State in which a stateless person or refugee had his or her lawful and habitual residence was entitled to protect that person, although exercising diplomatic protection on behalf of a refugee vis-à-vis a State of which he or she was a national would probably not be very effective. It was suggested that a system of protection analogous to diplomatic protection should be set up, in the context of human rights, for the benefit of stateless persons and refugees.

73. Others were of the view that article 8 clearly involved the progressive development of international law and was not supported by State practice and even seemed contrary to some provisions of the schedule annexed to the 1951 Geneva Convention relating to the Status of Refugees, which stated clearly that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue and did not confer on those authorities a right of protection. Similarly, the 1961 Convention on the Reduction of Statelessness was silent on the question of diplomatic protection. In addition, since it was difficult to envisage the circumstances under which such an obligation might be imposed, according diplomatic protection to those categories of persons would place an additional burden on States.

Article 9

74. While the Special Rapporteur was commended for his open-minded approach to the issue of continuous nationality, strong support was expressed for the retention of the customary rule, i.e. that diplomatic protection could only be exercised on behalf of a national of the plaintiff State, and that the link of nationality must exist from the first to the last moment of the international claim. It was stated that the rule of continuous nationality had been widely confirmed in judicial practice and was an established norm of customary international law. It was also noted that there were good reasons, rooted in both doctrine and practice, for the traditional rule, i.e. that it allowed the State in question to assert its own rights and prevented "protector shopping" by injured individuals. It was further stated that the Special Rapporteur's proposals to amend the rule would run counter to the basic concept underlying diplomatic protection, whereby the right to lodge an international claim against the injuring State was vested in the State of nationality and not in the injured person.

75. Conversely, others expressed some support for the Special Rapporteur's criticism of the traditional rule of continuous nationality, and for his proposals that the Commission should adopt a more flexible rule, giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection. A view was expressed that there were serious concerns about the rule in its current form. It could cause great injustice where a person after sustaining an injury had undergone an involuntary change of nationality as a result of State succession or marriage. The content of the rule was itself unclear, because the concept of the date of the injury and the date of presentation of the claim had not been clarified. The rule had not been consistently upheld by judicial decisions, doctrine or attempts at codification and was difficult to reconcile with developments in the field of human rights. Reference was made to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, requiring States parties to grant women equal rights with men to acquire, change or retain their nationality and to ensure that neither marriage to an alien nor change of nationality by the husband during

[3] Ibid., para. 24 (e) and (f).

marriage would automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

76. However, a view was also expressed that the current trend towards protecting individuals did not justify a change in the continuous nationality rule. It was pointed out that the traditional rule reflected the idea that, through diplomatic protection, the State asserted its own rights, i.e. that diplomatic protection was a discretionary right of the State, a mechanism that regulated inter-State relations. As such, the right of diplomatic protection belonged to the State, not to the individual. A necessary condition for a State to exercise that right was the existence of a legal relationship between the State and the individual, based on his or her nationality. While such approach did not entirely conform with the interests of the individual in the context of human rights, those rights were protected in other ways and by different means, including the right of individual petition under human rights conventions. While a State exercising diplomatic protection had to take the rights of the injured person into account, diplomatic protection was not in itself a human-rights institution. Moreover, the merging of the concepts of diplomatic protection and human rights and the loss of clarity of their delimitative dimensions was not in the interest of international law or, ultimately, of individuals. Instead, it was proposed that while the traditional rule ought to be retained, the Commission could look at ways of making it more flexible, with a view to avoiding some inequitable results. To that end, it was proposed that more consideration should be given to the idea of introducing "reasonable" exceptions, in the context of progressive development, to deal with situations where the individual would otherwise have no possibility of obtaining a State's protection.

77. It was noted that unlike a voluntary change of nationality, which raised fears of abuse, involuntary change took place through nobody's fault, and common sense as well as justice demanded that the general rule of continuous nationality should be mitigated. Such cases included those involving an involuntary loss of nationality through State succession, where nationality was attributed directly and *ipso iure* by the law, and other cases including marriage and adoption. Other examples included cases where different nationalities were involved as a result of changes to the claim arising from inheritance and subrogation. It was suggested that such exceptions should be dependent on certain requirements: that the acquisition of nationality leading to the loss of the original nationality should have been undertaken in good faith and that there should be a substantial link between the individual and the subsequent nationality. Likewise, it was important to clearly delimit the exceptions in order to prevent abuse. It was proposed that the distinction between voluntary and involuntary change of nationality could be used as a guideline for drawing up such exceptions and serve to reduce incidents of "claim shopping" and "forum shopping". It was also suggested that a distinction should be drawn between an involuntary change of nationality due to marriage or death of the person concerned, or due to a succession of States, and cases in which the transfer of the claim occurred as a consequence of subrogation, assignment, adoption or naturalization. In terms of that view, the latter cases called for more careful examination and should not be treated as cases of continuous nationality even if, in certain specified circumstances, they might also be covered by diplomatic protection.

78. In terms of a drafting suggestion, it was proposed that the requirement of a bona fide change of nationality following an injury attributable to the State did not seem sufficient, especially in the light of the modern trend to give individuals more freedom to change their nationality, resulting from the growing recognition of the human right to a nationality. It was also proposed that article 9 should distinguish more clearly between natural and legal persons.

Article 10

79. Support was expressed for the Special Rapporteur's treatment of the legal regime relating to the exhaustion of local remedies, which was considered to be a well-established rule of international law. Support also existed for the Special Rapporteur's decision to deal with the rule in several distinct articles. While general satisfaction with the article was expressed, it was also stated that the approach taken was not entirely consistent with the solution adopted in the context of the draft articles on the responsibility of States for internationally wrongful acts.

80. Regarding paragraph 1, it was suggested that the wording of the article could be improved by providing that the national whose claim was to be espoused need only exhaust "available and effective" local remedies. Otherwise, the term "all" in reference to local remedies

would be too broad and would impose an excessive burden on the injured individual. It was also observed that the criterion of effectiveness had been consistently applied under international human rights conventions, including the European Convention on Human Rights. It was also suggested that the word "available" should be subject to further qualification with terms such as "legally" and "practically".

81. Others preferred retaining the formulation of paragraph 1, without the addition of the criterion of effectiveness, since it could give rise to subjective interpretation. The view was expressed that it was questionable whether the rule of the exhaustion of domestic remedies required further qualification since it was sufficient for such remedies to be available within a reasonable period and for the rule to be interpreted in good faith. It was also pointed out that the effectiveness of the standards of justice employed in the State should not be questioned, as long as those standards were in conformity with natural justice. In that regard, the view was expressed that the Commission should not consider the concept of denial of justice. Still others supported the inclusion of the concept in the draft articles, since no injury would be attributable to a State without proof that justice had been denied.

82. Concerning paragraph 2, it was suggested that the Commission should reconsider the limitation that only those remedies that were available "as of right" must be pursued. In some legal systems, the latter requirement would mean that claimants would not have to seek relief from the highest court in cases where parties could not appeal "as of right". Others expressed a preference for the view that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule. It was noted that such an approach conformed with existing jurisprudence, which envisaged only judicial or administrative remedies available as of right. It was proposed that the guiding criterion for a "remedy" should be that it was sufficient and available to everybody, thereby excluding purely discretionary remedies.

83. A view was also expressed that the article should contain a comprehensive definition of the remedies to be exhausted. It was also suggested that the phrase "judicial or administrative courts or authorities whether ordinary or special" would be sufficient. Under another view, the reference to "administrative courts or authorities" went beyond the scope of legal remedies, since such authorities could be connected to the political organs of the State. Moreover, the phrase "ordinary or special" was considered ambiguous and needed clarification. It was further suggested that the Commission should consider the question whether a claim before a jurisdiction which was not domestic, but was accessible to all the nationals of the State, could or could not be considered a local remedy.

84. In terms of further suggestions, it was pointed out that the question of when and at what period an individual's claim became an international claim could also be clarified. It was further pointed out that the rule, which had evolved over a long period in case law, had numerous specific applications not expressly addressed in the text. It was thus suggested that the article could be more explicit about practical problems such as appeals and other available means of challenging a judgement under the domestic legal system, the potentially fatal consequences of not calling certain indispensable witnesses, and the need to avail oneself of all procedural means crucial to the success of the case.

Article 11

85. It was noted, with regard to article 11, that the local remedies rule applied only in the case of claims made by a State because one of its nationals had been injured, rather than in pursuit of reparation for an injury done to the State itself. However, in practice, diplomatic claims were often mixed, involving both a direct injury to the State itself and an indirect injury to the State by virtue of an injury to its national. In such cases, it was difficult to lay down a general rule. Instead, a flexible approach should be adopted, in order to strike an equitable balance between the interests of the State and those of its nationals. The view was expressed that article 11, in the wording "preponderantly" and "but for the injury to the national", offered two tests which were satisfactory for the purpose. It was also suggested that the two tests should apply alternatively and not cumulatively, and that it should be left up to the judge to apply those tests or criteria. There was therefore no need for illustrative examples in that respect.

86. Particular support was expressed for the preponderance test, which had been resorted to in a number of cases decided by international courts. It was observed that, although it was difficult to decide whether a claim was direct or indirect, this was not an

impossible task. It was suggested that when faced with an injury that was both direct and indirect, it was necessary to examine the component elements and to treat the incident as a whole on the basis of the preponderant element. The view was also expressed that a "request for a declaratory judgement", as referred to in article 11, could be considered an indication that an injury was direct so far as the State was concerned. It was proposed that a separate article should be included to deal with the question of the application of the preponderance test, especially in mixed cases, and to consider cases where a request for a declaratory judgement or order might not apply. It was further noted that other factors, such as the subject of the dispute, the nature of the claim and the remedy claimed, could also be considered when assessing whether a claim was predominantly direct or indirect. Others noted that while the distinction between direct and indirect claims was correct in principle, the Special Rapporteur's criteria for the distinction were not persuasive and should be examined further. Still others proposed that additional thought should be given to the attempt to draw a line between direct and indirect claims in article 11. In terms of a further drafting suggestion, the Commission could consider merging articles 10 and 11.

Article 14

87. Reference was made to the Special Rapporteur's proposal for future work on article 14 covering those situations where local remedies would not need to be exhausted.[4] Support was expressed for the Special Rapporteur's inclusion, among the grounds for dispensing with the rule, of the absence of a voluntary link between the injured individual and the respondent State. The example of instances where transboundary pollution occurred was cited in that regard.

3. Comments on specific issues

Legal persons

88. With regard to the questions contained in paragraph 28 of the Commission's 2001 report, a view was expressed that the diplomatic protection of companies should also be predicated on a legal relationship between the State and the company, based on its nationality. The latter could, as was the prevailing practice in many countries, be based on where the company was incorporated or registered. Only the State whose nationality a company had acquired through incorporating or registering in it had the right to give it diplomatic protection. Others noted that State practice was not yet clearly established, and therefore the current trends and evolving practice had to be considered. Indeed, the view was expressed that, since the question of the diplomatic protection of legal persons raised many special issues deserving careful analysis and elucidation by the Commission, work should first focus on the protection of natural persons, leaving any decision about the inclusion of legal persons in the final text to a later stage.

89. As regards the issue of the diplomatic protection of shareholders, it was observed that the matter was linked to the 1970 decision of the International Court of Justice in the *Barcelona Traction* case. The Court majority had ruled that the general rule of international law authorized the national State of the company alone to make a claim, thus denying diplomatic protection to the shareholders of the company. Nevertheless, that ruling had been criticized by various writers as unfair to shareholders. Indeed, others observed that the Court had not ruled on the question whether a State could exercise diplomatic protection on the ground of the nationality of the majority of shareholders if the company had been wound up, or if the company had the same nationality as the State from which it was to be protected. It would thus be useful for the Commission to examine both hypotheses in order to specify the conditions on which exceptions to the general rule could be formulated. In that regard, support was expressed for the view that, if damages and injuries were sustained by a shareholder, the State of which the shareholder was a national should be able to exercise diplomatic protection on its behalf.

90. According to another view, the company and its shareholders requested two different legal concepts. An injury to a company caused by a State did not necessarily give claim rights to shareholders. It was not appropriate for a State whose nationals were shareholders to exercise diplomatic protection vis-à-vis the State in which the company was incorporated or registered. It was also noted that the issue of foreign shareholders bringing a claim against their own company appeared to fall within the purview of the internal law of States, except where there was a denial of justice or discrimination against aliens.

[4] See A/CN.4/514, para. 67.

D. Unilateral acts of States

1. General comments

91. Support was expressed for the work carried out by the Commission on a difficult topic, which was evidenced by the fact that the Commission itself had had discussions about the feasibility of codifying it and the problems seemingly encountered by States in identifying their practice in the area. Delegations welcomed the progress achieved so far, though it was also noted that the Commission had not proceeded as swiftly as it should have on the topic.

92. The point was made that the study should continue, an endeavour which required receiving further information on the practice of States and international organizations. It was stated that such information should be received before seeking any conclusions on how to proceed with the topic. According to another view, the Commission should consider the possibility of framing a set of conclusions on the topic, instead of proceeding with the preparation of draft articles.

2. Classification of unilateral acts and scope of the topic

93. The point was made that, although it would be valuable from a theoretical point of view, a classification of unilateral acts was not necessarily important or useful for States; what really mattered was whether the unilateral act was binding on the author State and whether other States could rely on the binding character of that act.

94. Under another view, however, it was important to have a classification of unilateral acts, as a prior step to developing rules on the topic. In that connection, it was stated that the Commission should be able to provisionally develop a classification based on the criterion of legal effects.

95. As regards the two proposed categories of unilateral acts, those whereby a State undertook obligations and those whereby it reaffirmed a right, the point was made that further consideration was required as to whether the two proposed categories were appropriate. In that connection it was stated that some unilateral acts, such as recognition and protest, were difficult to place in the proposed categories. According to this view, a third category should be added, comprising acts that accepted or rejected a certain situation or legal relationship.

96. It was also noted that some unilateral acts might fall under two categories at once. For example, where a State declared itself neutral, it could be considered both to be assuming obligations and to be reaffirming a right.

97. According to one view, the classification of unilateral acts on the basis of their legal effects was correct, yet the inclusion of interpretative declarations was questionable; such declarations, because they were treaty-based, needed to be considered in the context of reservations.

98. As regards interpretative declarations which were linked to a prior text but went beyond the obligations contained in a treaty, the point was made that, even if such interpretative declarations were deemed to be independent acts, the treaty to which the acts were related should be taken as the context within which they were construed; a system established by treaty provisions binding upon its parties should not be amended by unilateral acts on the part of one of them.

99. The point was made that the classification of unilateral acts contained in the draft articles omitted unilateral declarations and the conduct of States, an omission which might not be warranted. In that connection, two examples were given of unilateral declarations that had evolved into norm-creating precedents, namely, the two Truman Proclamations of 1946 on conservation and on the continental shelf.

100. A view was expressed that it was important to distinguish between the forms of unilateral acts and their effects. As regards the form, four modalities were mentioned: (a) specific notations to specific addressees; (b) general declarations or statements issued *urbi et orbi*; (c) actions unaccompanied by any statement or declaration; and (d) silence amounting to acquiescence.

101. With regard to the effects of unilateral acts, a list of 10 variables was presented: (i) assumption of an international legal obligation; (ii) termination of an international legal obligation; (iii) claim of a right; (iv) waiver of a right; (v) exercise of a right; (vi) creation of a new status; (vii) termination of such status; (viii) recognition of a new State or Government; (ix) interpretation of the State's own position vis-à-vis

its obligations and rights; and (x) protest against another State's acts.

102. The effects, of course, would be contingent on the validity of the unilateral act of a State. It was also noted that a unilateral declaration by a State was not binding per se, but gave rise to a state of estoppel, so that the State was subsequently precluded from acting in a manner incompatible with the declaration. According to this view, estoppel deserved to be addressed by the Commission before it finalized the study of unilateral acts.

103. As regards the content of draft article 1, preference was expressed for having the phrase "the expression of will" qualified by the insertion of the word "autonomous". The word "intention" should be interpreted as referring to the declared intention of the author State, rather than its true intention.

104. As regards the scope of the topic, some delegations were of the view that there was no need for a comprehensive set of rules. Still others favoured a focus on the more highly developed areas of State practice. It was stated that work could preferably concentrate on certain typical unilateral acts and the legal regime which would apply to them. The elements of interpretation which had to be brought to bear in determining whether an act or omission constituted a unilateral act would themselves play a role in its classification. That process should precede the process of interpreting the specific character of an act already identified as unilateral, but the content and scope of which were doubtful.

105. It was indicated that the category of specific acts outside the scope of the study could be extended to include a unilateral reservation made in the context of a treaty, as well as declarations of war or neutrality and protests, those being acts which reaffirmed rights.

106. The view was expressed that the conduct of States which might produce legal effects deserved independent scrutiny apart from unilateral acts.

107. The point was made that the Commission should concentrate on formulating and considering the general rules applicable to all unilateral acts. Once the universality and significance of each act had been established, rules concerning each category could be formulated according to the specific situation and needs, with detailed provisions on the establishment of elements and legal validity.

108. Support was expressed for the decision by the Special Rapporteur to omit silence from the study on the topic, since it could not be equated with a unilateral act. The view was also expressed that countermeasures were not comparable with unilateral acts and should therefore not be part of the study.

3. Approach to the topic

109. The view was expressed that the attempt to develop a body of rules applicable to all unilateral acts was not well-founded. It was felt that common rules could be established concerning the definition, formulation and interpretation of unilateral acts. Nonetheless, it was also noted that the same would not apply to the legal effects of unilateral acts, in view of the diversity of such effects.

110. It was stated that because of their peculiarities unilateral acts of States should be made subject to certain clear conditions in order to produce legal effects. In that connection, an example was given that unilateral acts in the form of domestic laws of a State should not address their effects to foreign citizens in the territory of another State, thereby creating extraterritorial consequences and seeking to establish a quasi-legal relationship between one State and the citizens of another.

111. The view was expressed that the Commission should focus on acts forming an autonomous source of international law, when a unilateral act constituted a binding obligation towards another State or States or towards the international community as a whole. Such acts, though not common, should be regulated for reasons of legal certainty. Consequently, the Commission should not consider unilateral acts which were linked with a treaty or with a rule of customary international law or institutional acts of international organizations.

112. As regards the autonomy of unilateral acts, it was stated that in order to qualify as unilateral an act should produce autonomous legal effects independent of any manifestation of will on the part of any other subject of international law; autonomy was an essential criterion that should be duly taken into account in its definition. It was also indicated that in considering only unilateral acts which had no connection with existing customary or conventional rules, there was a risk of depriving the subject of much of its importance.

113. According to one view, the Commission should refrain from elaborating any new articles until it had completed six priority tasks: (i) agreeing on a typology or list covering all categories of unilateral acts; (ii) deciding whether or not to add a residual list; (iii) determining whether all categories of specific acts on the list should be retained; (iv) deciding whether each of the specific categories would be governed by the general rules; (v) determining whether special rules might be required in the case of some specific categories of acts for which the general rules might not suffice; and (vi) agreeing on categories among which the general rules would be distributed.

114. Some delegations expressed support for the approach taken by the Special Rapporteur to adopt the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties. However, it was also recalled that while a treaty was consensual in character, a unilateral act was not and, consequently, that difference had to be kept in mind. In that connection, it was stated that the starting point should be the interpretative needs of the unilateral act, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.

115. It was stressed that the interpretation of unilateral acts by States must be undertaken carefully, taking into account the specific circumstances and the particular characteristics of the unilateral act. That was especially important when it was argued that a State had assumed a binding obligation through a unilateral declaration; in such a case, the conclusion that a State had unilaterally assumed a binding obligation was wholly contingent on an unequivocal finding that such had been the intention of the State issuing the declaration. The intention of the author State should be a main criterion, and thus greater emphasis should be given to preparatory work which offered a clear indication of the intent.

116. It was stated that the object and purpose of a unilateral act needed to be taken into account for the purposes of interpretation; that was the foundation for one of the basic rules of interpretation, the rule of effectiveness. An additional clause could be added referring to the need to pay due regard to the intention of the State making the declaration and to the restrictive interpretation of unilateral acts.

117. The point was made that it might not be possible for all unilateral acts to be subject to the same rules of interpretation. There would be two levels of interpretation, the first one with the purpose of determining whether a particular unilateral act fell within the category of acts intended to produce legal effects. Once it had been determined that that had indeed been the intention, the second level of interpretation consisted of dispelling any doubts as to the substance of the act. It was unclear whether the same rules of interpretation should apply to the two levels.

118. Support was expressed by some delegations for new draft articles (a) and (b), though it was also stated that paragraphs 1 and 2 of article (a) could be merged. As regards article (a), paragraph 1, doubts were formulated as to whether it would be applicable to all categories of unilateral acts. In relation to article (a), paragraph 2, the suggestion was made to add the words "if available" after the word "annexes", in order to cover orally formulated acts. In draft article (b), the deletion of the words "preparatory work" was proposed in the light of the fact that preparatory work did not qualify as supplementary means of interpretation of unilateral acts because, if such preparatory work existed, it would be extremely difficult for the addressee State to have access to it.

119. According to another view, the new draft articles were not convincing for several reasons: it was doubtful whether the provisions of the 1969 Vienna Convention on the Law of Treaties could be applied to unilateral acts, given the specific nature of such acts; the intention of the author State was the most important factor to be considered, even more so than the content of the unilateral act; the two draft articles contained various contradictions in that they seemed to make the intention the overriding criterion, yet situated the means of establishing that intention among the supplementary means of interpretation. The approach of the Special Rapporteur did not seem compatible with that of the International Court of Justice, which had attached greatest importance to the intention of the author State.

120. As regards the invalidity of unilateral acts, it was indicated that State practice mattered more than the application of rules pertaining to conventional acts.

121. The point was also made that the time had not yet come to consider the interpretation of unilateral acts; it was first necessary to draft the substantive and procedural rules on the topic.

E. Other decisions and conclusions of the Commission

122. With regard to its long-term programme of work, delegations expressed appreciation for the Commission's consideration of the question. They saw particular merit in the proposed new topics in view of the potential need for clarification of the law in areas in which practical problems might arise. Many delegations were of the view that the topic "Responsibility of international organizations" was ripe for codification and that the Commission should give priority to it from among the five recommended topics. Some delegations also expressed support for consideration of the topic "Shared natural resources".

123. It was also stated that the Commission should cooperate with other international bodies which contributed to the consolidation of general international law by promoting significant international agreements.